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IN BOUND VOLUMES

MHS
Westampton, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW CENTURY TRANSPORTATION, INC.
Employer

and

Case 04-RC-115860

TEAMSTERS LOCAL UNION LOCAL NO. 107
a/w INTERNATIONAL BROTHERHOOD OF
TEAMSTERS
Petitioner

DECISION AND DIRECTION

The National Labor Relations Board, by a three-member panel, has considered objections and determinative challenges in an election held December 10, 2013, and the administrative law judge's decision¹ recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 94 ballots for and 94 against the Petitioner, with 18 challenged ballots.²

The Board has reviewed the record in light of the exceptions and briefs and has adopted the judge's findings and recommendations.

1. We agree with the judge that the Board agent's failure to follow the Board's procedures for conducting an election did not create a reasonable doubt as to the fairness and validity of the election. See *Polymers, Inc.*, 174 NLRB 282, 282 (1969), *enfd.* 411 F.2d 999 (2d Cir. 1969), *cert. denied* 396 U.S. 1010 (1970).

¹ The judge was sitting as a hearing officer in this proceeding.

² In the absence of exceptions, we adopt pro forma the judge's recommendation that the challenges to the ballots of 12 voters be sustained.

It is undisputed that, following the voting, the Board agent failed to enter pertinent information on the face of the Determinative Challenged Ballot Envelope (Form NLRB-5126), place the envelopes containing the 18 challenged ballots into the NLRB-5126 and seal it in the presence of the parties, sign and have the parties' representatives sign their names across the NLRB-5126 flap, or secure the flap with transparent tape. See NLRB Casehandling Manual, Part Two, Section 11340.9(a). Instead, outside the presence of the parties and in connection with cleaning up the voting area, the Board agent simply placed the NLRB-5126 containing the challenged ballots in her briefcase. The briefcase remained in her custody until the next day, when she took it, and the ballots, to the Regional Office. Upon reviewing the Casehandling Manual, she discovered that she had failed to follow the proper procedures. She reported the error to her supervisor, who instructed her to take the information from the individual challenged ballot envelopes and complete the form on the front of the NLRB-5126. After doing so, she placed the challenged ballot envelopes back into the NLRB-5126, sealed it with tape, wrote her name on it, and placed it in the Regional Office safe, where it remains. The ballots have not been opened, and there is no evidence that any of them have been tampered with. Indeed, as the judge found, any contention of tampering would be based on sheer speculation.

We find that the Board agent's conduct does not warrant setting aside the election, under all the circumstances here. We are guided by the Board's decision in *N. Sumergrade & Sons*, 123 NLRB 1951, 1951-1952 (1959). There, the Board agent placed the envelopes containing the challenged ballots into a cardboard carton and sealed it; the parties initialed the carton, which was kept thereafter in the custody of the Regional Director. Later, however, without previously informing the parties and in their absence, Board agents investigating the challenged ballots opened the sealed carton in order to compare the names on the individual envelopes with the

employer's payroll and place them in alphabetical order. Subsequently, the ballots were opened and counted in the presence of the parties. The Board found that the better practice would have been not to open the sealed carton without notice to the parties, but that the Board agents' actions did not warrant invalidating the election, because the Regional Office at all times had custody of the sealed envelopes containing the challenged ballots and the envelopes had not been opened or tampered with. Essentially the same circumstances exist here, and compel the same result. The sealed envelopes containing the challenged ballots were at all times in the custody of the Board agent and then the Regional Office, and they were not opened or tampered with.

Like the judge, we find that *Paprikas Fono*, 273 NLRB 1326 (1984), is distinguishable on its facts and does not compel us to set aside the election. There are, to be sure, certain similarities between the two cases. There, as here, the Board agent conducting the election failed to comply with the procedures for sealing the envelopes containing challenged ballots in an envelope signed by the parties' representatives. Instead, the agent placed the envelopes containing the ballots into a larger envelope the next day, sealed and signed the large envelope, and placed it in the Regional Office safe. At this point, however, the facts in *Paprikas Fono* deviate significantly from the facts in this case. The employer in *Paprikas Fono* had alleged in objections that the Board agent had interfered with the election by failing to ensure that the challenged ballot envelopes were properly sealed before placing them in the ballot box; the Regional Director had ordered a hearing on that allegation and others. Nevertheless, some 5 days before the hearing, the regional attorney and counsel for the Region in the matter decided to determine for themselves whether any of the challenged ballot envelopes were crumpled, written on, or improperly sealed, as the employer had alleged. With the permission of the Assistant Regional Director, they asked the Board agent to give them the large envelope containing the

ballots from the safe. The agent did so, and the counsel for the Region opened the large envelope and inspected (but did not open) the envelopes containing the challenged ballots. Afterwards, counsel for the Region returned the envelopes to the Board agent, who placed them in another large envelope, sealed it, and placed it in the office safe. *Id.* at 1327.

The Board in *Paprikas Fono* set the election aside, under all the circumstances. It “stress[ed] that [it was] not setting aside the election simply because the Casehandling Manual was not followed,” but rather because “reviewing all the facts in this case, [it found] the particular conduct involved sufficiently serious to set aside the election.” *Id.* at 1328 fn. 4. The Board pointed to the failure of the Board agent to follow the Casehandling Manual, but described as “[e]ven more serious . . . the Regional Office’s subsequent conduct.” *Id.* at 1328. The Board found it “particularly troublesome” that Region personnel had opened the envelope to investigate the condition of the challenged ballot envelopes when an objection alleging that the ballots had been mishandled by other Region personnel had already been set for a hearing. *Id.* at 1328. In that regard, the majority distinguished *N. Sumergrade*, *supra*, by noting that the box there had been opened “solely for administrative purposes.” *Id.* at 1329. The *Paprikas Fono* Board also relied on the facts that (1) the parties had stipulated that the Board agent had “handled the ballots in the manner prescribed by the Casehandling Manual,” contrary to the agent’s later hearing testimony, and (2) that the Region would not have informed the parties of its questionable conduct, had not the Employer’s attorney first raised concerns. *Id.* at 1328 fn. 5. “In all these circumstances,” the Board concluded, “a second election is the better course.” *Id.*³

³ We do not read *Paprikas Fono* to create a per se rule that whenever the parties to a Board election are denied the opportunity to monitor the determinative ballot procedure in some respect, the election must be set aside. Rather, the Board found a reasonable doubt as to the fairness and validity of the election “[w]hen such opportunity to monitor *is denied as it was here* [i.e., in that case]” 273 NLRB at 1328 (emphasis added).

This case is decisively closer to *N. Sumergrade* than to *Paprikas Fono*. Here, as in *N. Sumergrade*, the Board agent’s handling of the challenged ballot envelopes was done “solely for administrative purposes” (to copy information contained on the exterior of each challenged ballot envelope onto the NLRB-5126). What the Board found “particularly troublesome” in *Paprikas Fono*—certain Region personnel handling and inspecting evidence concerning allegedly objectionable conduct on the part of other Region personnel—is entirely absent from this case. In sum, while the Board agent’s conduct here was far from flawless, it did not raise a *reasonable* doubt as to the fairness and validity of the election.

2. In overruling the Employer’s objection alleging that a piece of the Petitioner’s campaign literature was a forgery, we agree with the judge that the Employer failed to prove that the document was a forgery. Thus, the Petitioner obtained the document from an outside and legitimate source; the content of the document matched other publicly available information (an SEC filing); the Petitioner did not change the document except to add a note that was obviously not part of the original; and the Employer did not provide any specific evidence that the document was a forgery. Analyzed under the standard articulated in *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), the document with the note, distributed by the Petitioner and criticized by the Employer, was clearly recognizable as campaign-related literature and would be so evaluated by the employees.⁴

3. The judge recommended that the ballots of Steven Bell, Paul Laney, Steven Long, and Robert Read be opened and counted. We adopt that recommendation for two reasons. First, although the Employer argues that those employees are “dedicated drivers” and are not included in the unit, the judge found, and we agree, that they are in fact “local drivers” who are

⁴ Although it is not critical to our conclusion, we note, as did the judge, that the Employer distributed a rebuttal to the Petitioner’s document.

specifically included in the stipulated unit description. Thus, at least with regard to those four individuals, we find that the stipulation is not ambiguous in any relevant way. See *Caesar's Tahoe*, 337 NLRB 1096, 1097 (2002).⁵ Second, even though the stipulation is ambiguous as to whether “dedicated drivers” are included in the unit, we agree with the judge’s conclusion, based on his community-of-interest analysis, that the named employees belong in the unit.⁶

DIRECTION

IT IS DIRECTED that the Regional Director for Region 4 shall, within 14 days of this direction, open and count the ballots of Steven Bell, Paul Laney, Steven Long, Robert Read, Gerard Sippel, and John Spolnicki,⁷ and thereafter prepare and serve on the parties a revised tally of ballots, and issue the appropriate certification.

Dated, Washington, D.C., November 12, 2014

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

⁵ With respect to Laney, the evidence shows that he essentially performs local (as opposed to regional) work for WorldPac. Moreover, the judge found that Laney shares numerous other community-of-interest factors with the Employer’s local drivers, and the Employer did not challenge that finding.

⁶ We agree with the judge that Gerard Sipple was entitled to vote in the election. In this regard, we note that the Board applies the standard articulated in *Red Arrow Freight Lines, Inc.*, 278 NLRB 965 (1986), to evaluate the voting eligibility of employees on sick leave. Thus, *Cato Show Printing Co.*, 219 NLRB 739 (1975), not only is factually distinguishable, as the judge found, but also employs an analytical framework that is of doubtful validity. See, e.g., *Supervalu, Inc.*, 328 NLRB 52, 52 (1999); *Air Liquide America Corp.*, 324 NLRB 661, 663 (1997).

⁷ The parties have stipulated that Spolnicki was an eligible voter.

MEMBER MISCIMARRA, dissenting.

My colleagues uphold the election in this case, notwithstanding the Board agent's failure to follow the Board's procedures for handling challenged-ballot envelopes—procedures created to enable parties to an election to assure themselves that challenge envelopes are secure and that no irregularity has occurred. Although there is no per se rule that any election irregularity mandates a new election, our cases draw lines, and here, the applicable line is drawn in *Paprikas Fono*.⁸ I would find this case is governed by *Paprikas Fono* and would set the election aside.

One of the Board's most important roles is to ensure the fairness and integrity of representation elections. To that end, the Board has developed procedures that permit the parties to monitor the election process, the tabulation of votes, and the handling of challenged ballots. The Board does not have, and I do not advocate, a per se rule that any election irregularity warrants setting aside the election. In *Paprikas Fono*, however, the Board was clear that

where the normal procedures for handling determinative challenges were not followed and the procedures followed did not permit the parties to assure themselves that the challenge envelopes were secure, we consider the manner in which the election was conducted to raise a “reasonable doubt as to the fairness and validity of the election” under the standard set forth in *Polymers, Inc.*⁹

In *Paprikas Fono*, the Board agent placed the 21 challenged ballots in the case file, which he then locked in his office. The next day, he put the challenged ballots in a large manila envelope, attached a cover sheet listing the names of the challenged voters, sealed the envelope with tape, and wrote his own signature across the tape. Because the Board agent “did not . . . immediately place the challenged ballots in a large envelope sealed with tape over the signatures of the parties’ representatives,” the parties “could not verify that [the Board agent] had followed

⁸ 273 NLRB 1326 (1984).

⁹ *Paprikas Fono*, 273 NLRB at 1328 (quoting *Polymers, Inc.*, 174 NLRB 282, 282 (1969), *enfd.* 411 F.2d 999 (2d Cir. 1969), *cert. denied* 396 U.S. 1010 (1970)).

the proper procedure.” *Id.* In this case, by comparison, the Board agent placed the 18 challenged ballots in a large manila challenged-ballots envelope, which she then placed in a file folder in her briefcase and took home. The next day, the agent copied the information from the individual challenged-ballot envelopes onto the outside of the large manila envelope, sealed the envelope with tape, and wrote her own signature across the tape. In my view, this case and *Paprikas Fono* address the same type of irregularity that warrants setting aside the election.¹⁰ Here, as there, the procedure followed by the Board agent “did not permit the parties to assure themselves that the challenge envelopes were secure.” *Id.* It is not the Board agent’s failure to follow the Board’s procedures that warrants setting aside the election, but rather the fact that, like in *Paprikas Fono*, the alternate procedure the Board agent followed deprived the parties of the opportunity to monitor the entire election process.¹¹

My colleagues contend—and I agree—that there is no evidence that any of the challenged ballots have been tampered with. However, the more important point relates to the additional reason election procedures exist, which is to instill confidence that no irregularity has

¹⁰ My colleagues find *Paprikas Fono* distinguishable based on a statement that, in addition to the Board agent’s actions, the Region engaged in subsequent conduct that was “[e]ven more serious.” This reference to other, more serious conduct does not mean that the Board agent’s conduct was unobjectionable. To the contrary, in finding that the manner in which the election was conducted raised a reasonable doubt as to its fairness and validity under *Polymers*, the Board relied on the fact that “the procedures followed did not permit the parties to assure themselves that the challenge envelopes were secure.” 273 NLRB at 1328. That is also the case here. True, in *Paprikas Fono* there were reasons *in addition* to the Board agent’s conduct that also supported setting aside the election. But the absence of those additional reasons from this case does not diminish the fact that, under the *Polymers* standard as applied in *Paprikas Fono*, the Board agent’s conduct here warrants setting aside the election.

¹¹ *N. Sumergrade & Sons*, 123 NLRB 1951 (1959), relied on by the majority, is distinguishable. There, the Board agent placed the challenged ballots in a cardboard carton that he then sealed with tape and had the parties initial. Thus, the parties had the opportunity to monitor the *entire* election process. See *Paprikas Fono*, 273 NLRB at 1329 (stating that in *Sumergrade*, “at least . . . the box was sealed in the parties’ presence and initialed by them. That was not done here . . .”).

occurred. I have no doubt that the 18 challenged ballots in the manila envelope were those cast in the election. However, as I have expressed in other cases,¹² our election procedures exist for important reasons, and parties should not have to rely on the integrity of the Board's agents to establish that an election was conducted fairly; they should be able to verify that fact for themselves. Since they were not able to do so here, I would set aside the election.¹³

Philip A. Miscimarra, Member

¹² See *Magnum Transportation, Inc.*, 360 NLRB No. 129, slip op. at 1-2 (2014) (Member Miscimarra, concurring) (sustaining challenge to second ballot cast by voter even though he apparently marked an "X" on the wrong side of the first ballot he placed in the ballot box); *Patient Care of Pennsylvania*, 360 NLRB No. 76, slip op. at 2-3 fn. 4 (2014) (Member Miscimarra, concurring) (upholding failure to permit late-arriving voter to vote when sealed ballot box had already been opened).

¹³ Because I would set aside the election based on the handling of the challenged-ballot envelopes, I do not reach the Employer's objection or ballot challenges.